

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

RALPH PEDROZA,

Plaintiff,

vs.

CAROLYN W. COLVIN,

Acting Commissioner of Social Security,

Defendant.

No. 1:15-CV-3145-MKD

ORDER DENYING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT AND GRANTING
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT

ECF Nos. 15, 19

BEFORE THE COURT are the parties' cross-motions for summary judgment. ECF Nos. 15, 19. The parties consented to proceed before a magistrate judge. ECF No. 6. The Court, having reviewed the administrative record and the parties' briefing, is fully informed. For the reasons discussed below, the Court denies Plaintiff's motion (ECF No. 15) and grants Defendant's motion (ECF No. 19).

JURISDICTION

The Court has jurisdiction over this case pursuant to 42 U.S.C. §§ 405(g); 1383(c)(3).

STANDARD OF REVIEW

A district court's review of a final decision of the Commissioner of Social Security is governed by 42 U.S.C. § 405(g). The scope of review under § 405(g) is limited; the Commissioner's decision will be disturbed "only if it is not supported by substantial evidence or is based on legal error." *Hill v. Astrue*, 698 F.3d 1153, 1158 (9th Cir. 2012). "Substantial evidence" means "relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *Id.* at 1159 (quotation and citation omitted). Stated differently, substantial evidence equates to "more than a mere scintilla[,] but less than a preponderance." *Id.* (quotation and citation omitted). In determining whether the standard has been satisfied, a reviewing court must consider the entire record as a whole rather than searching for supporting evidence in isolation. *Id.*

In reviewing a denial of benefits, a district court may not substitute its judgment for that of the Commissioner. If the evidence in the record "is susceptible to more than one rational interpretation, [the court] must uphold the ALJ's findings if they are supported by inferences reasonably drawn from the record." *Molina v. Astrue*, 674 F.3d 1104, 1111 (9th Cir. 2012). Further, a district

1 court “may not reverse an ALJ’s decision on account of an error that is harmless.”
2 *Id.* An error is harmless “where it is inconsequential to the [ALJ’s] ultimate
3 nondisability determination.” *Id.* at 1115 (quotation and citation omitted). The
4 party appealing the ALJ’s decision generally bears the burden of establishing that
5 it was harmed. *Shineski v. Sanders*, 556 U.S. 396, 409-410 (2009).

6 **FIVE-STEP EVALUATION PROCESS**

7 A claimant must satisfy two conditions to be considered “disabled” within
8 the meaning of the Social Security Act. First, the claimant must be “unable to
9 engage in any substantial gainful activity by reason of any medically determinable
10 physical or mental impairment which can be expected to result in death or which
11 has lasted or can be expected to last for a continuous period of not less than twelve
12 months.” 42 U.S.C. §§ 423(d)(1)(A); 1382c(a)(3)(A). Second, the claimant’s
13 impairment must be “of such severity that he is not only unable to do his previous
14 work[,] but cannot, considering his age, education, and work experience, engage in
15 any other kind of substantial gainful work which exists in the national economy.”
16 42 U.S.C. §§ 423(d)(2)(A); 1382c(a)(3)(B).

17 The Commissioner has established a five-step sequential analysis to
18 determine whether a claimant satisfies the above criteria. *See* 20 C.F.R. §§
19 404.1520(a)(4)(i)-(v); 416.920(a)(4)(i)-(v). At step one, the Commissioner
20 considers the claimant’s work activity. 20 C.F.R. §§ 404.1520(a)(4)(i);

1 416.920(a)(4)(i). If the claimant is engaged in “substantial gainful activity,” the
2 Commissioner must find that the claimant is not disabled. 20 C.F.R. §§
3 404.1520(b); 416.920(b).

4 If the claimant is not engaged in substantial gainful activity, the analysis
5 proceeds to step two. At this step, the Commissioner considers the severity of the
6 claimant’s impairment. 20 C.F.R. §§ 404.1520(a)(4)(ii); 416.920(a)(4)(ii). If the
7 claimant suffers from “any impairment or combination of impairments which
8 significantly limits [his or her] physical or mental ability to do basic work
9 activities,” the analysis proceeds to step three. 20 C.F.R. §§ 404.1520(c);
10 416.920(c). If the claimant’s impairment does not satisfy this severity threshold,
11 however, the Commissioner must find that the claimant is not disabled. 20 C.F.R.
12 §§ 404.1520(c); 416.920(c).

13 At step three, the Commissioner compares the claimant’s impairment to
14 severe impairments recognized by the Commissioner to be so severe as to preclude
15 a person from engaging in substantial gainful activity. 20 C.F.R. §§
16 404.1520(a)(4)(iii); 416.920(a)(4)(iii). If the impairment is as severe or more
17 severe than one of the enumerated impairments, the Commissioner must find the
18 claimant disabled and award benefits. 20 C.F.R. §§ 404.1520(d); 416.920(d).

19 If the severity of the claimant’s impairment does not meet or exceed the
20 severity of the enumerated impairments, the Commissioner must pause to assess

1 the claimant's "residual functional capacity." Residual functional capacity (RFC),
2 defined generally as the claimant's ability to perform physical and mental work
3 activities on a sustained basis despite his or her limitations, 20 C.F.R. §§
4 404.1545(a)(1); 416.945(a)(1), is relevant to both the fourth and fifth steps of the
5 analysis.

6 At step four, the Commissioner considers whether, in view of the claimant's
7 RFC, the claimant is capable of performing work that he or she has performed in
8 the past (past relevant work). 20 C.F.R. §§ 404.1520(a)(4)(iv); 416.920(a)(4)(iv).
9 If the claimant is capable of performing past relevant work, the Commissioner
10 must find that the claimant is not disabled. 20 C.F.R. §§ 404.1520(f); 416.920(f).
11 If the claimant is incapable of performing such work, the analysis proceeds to step
12 five.

13 At step five, the Commissioner considers whether, in view of the claimant's
14 RFC, the claimant is capable of performing other work in the national economy.
15 20 C.F.R. §§ 404.1520(a)(4)(v); 416.920(a)(4)(v). In making this determination,
16 the Commissioner must also consider vocational factors such as the claimant's age,
17 education and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v);
18 416.920(a)(4)(v). If the claimant is capable of adjusting to other work, the
19 Commissioner must find that the claimant is not disabled. 20 C.F.R. §§
20 404.1520(g)(1); 416.920(g)(1). If the claimant is not capable of adjusting to other

1 work, analysis concludes with a finding that the claimant is disabled and is
2 therefore entitled to benefits. 20 C.F.R. §§ 404.1520(g)(1); 416.920(g)(1).

3 The claimant bears the burden of proof at steps one through four above.
4 *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999). If the analysis proceeds to
5 step five, the burden shifts to the Commissioner to establish that (1) the claimant is
6 capable of performing other work; and (2) such work “exists in significant
7 numbers in the national economy.” 20 C.F.R. §§ 404.1560(c)(2); 416.920(c)(2);
8 *Beltran v. Astrue*, 700 F.3d 386, 389 (9th Cir. 2012).

9 **ALJ’s FINDINGS**

10 Plaintiff applied for Title II disability insurance benefits and Title XVI
11 supplemental security income on August 27, 2012, alleging onset beginning May
12 12, 2007. Tr. 12, 196, 203.¹ The applications were denied initially, Tr. 80-81, and
13 upon reconsideration, Tr. 82-83. Plaintiff appeared for a hearing before an
14

15
16 ¹ The ALJ identifies August 27, 2012 as the Plaintiff’s application date. Tr. 12.
17 The applications for benefits are dated September 5, 2012. Tr. 196, 203. It
18 appears Plaintiff may have begun his application on August 27 and completed it on
19 September 5, 2012, but it is of no consequence to the ultimate decision regarding
20 eligibility for benefits.

1 administrative law judge (ALJ) on November 25, 2013. Tr. 31-61. On February
2 27, 2014, the ALJ denied Plaintiff's claim. Tr. 9-30.

3 As a threshold issue, the ALJ found that Plaintiff met the insured status
4 requirements of the Act with respect to his disability benefit claim through
5 September 30, 2010. Tr. 14. At step one, the ALJ found that Plaintiff engaged in
6 substantial gainful activity in January 2008, June through July 2008, June 2009,
7 and August through September of 2009. Tr. 15. At step two, the ALJ found
8 Plaintiff suffers from the following severe impairments: lumbar spine spondylosis
9 with facet arthrosis; obesity; borderline intellectual functioning; affective disorders
10 variously diagnosed as depression and mood disorders; posttraumatic stress
11 disorder; personality disorders variously diagnosed as antisocial personality
12 disorder and personality disorder not otherwise specified with antisocial and
13 borderline features; and a history of polysubstance dependence, in remission. Tr.
14 15. At step three, the ALJ found that Plaintiff does not have an impairment or
15 combination of impairments that meets or medically equals a listed impairment.
16 Tr. 15. The ALJ then concluded that the Plaintiff has the RFC to perform medium
17 work, with additional limitations. Tr. 18. At step four, the ALJ found Plaintiff can
18 perform past relevant work as a vegetable II farm worker. Tr. 23. Alternatively,
19 the ALJ proceeded to step five and found that, considering Plaintiff's age,
20 education, work experience, and RFC, there are jobs in significant numbers in the

1 national economy that Plaintiff could perform, such as industrial cleaner, lumber
2 sorter,² and stores laborer. Tr. 23-24. On that basis, the ALJ concluded that
3 Plaintiff is not disabled as defined in the Social Security Act. Tr. 25.

4 On July 21, 2015, the Appeals Council denied review, Tr. 1-6, making the
5 ALJ's decision the Commissioner's final decision for purposes of judicial review.
6 *See* 42 U.S.C. § 405(g); 20 C.F.R. § 422.210.

7 ISSUES

8 Plaintiff seeks judicial review of the Commissioner's final decision denying
9 him disability income benefits under Title II and supplemental security income
10 under Title XVI of the Social Security Act. ECF No. 15. Plaintiff raises the
11 following issues for this Court's review:

- 12 1. Whether the ALJ had a duty to order a consultative examination to further
13 develop the record;
- 14 2. Whether the ALJ properly weighed the medical opinion evidence;
- 15 3. Whether the ALJ ought to have considered whether Plaintiff met Medical
16 Listing 12.03; and

17
18 ² The ALJ's decision reads "lumbar sorter." Tr. 24. This is a scrivener's error as
19 the ALJ's reference to the Dictionary of Occupational Titles makes clear. Tr. 24
20 (referring to DOT 922.687-074, which describes a lumber sorter).

1 4. Whether Plaintiff met Medical Vocational Guideline Rule 202.09.
2 ECF No. 15 at 9.

3 **A. Developing the Record**

4 Plaintiff contends the ALJ failed to fully develop the record. ECF No. 15 at
5 14-17.

6 The gathering and presentation of medical evidence is critical to the fair and
7 effective operation of the system for distributing social security benefits based on
8 disability. *Reed v. Massanari*, 270 F.3d 838, 841 (9th Cir. 2001). Although the
9 claimant bears the burden of demonstrating disability, *Bowen v. Yuckert*, 482 U.S.
10 137, 146 n.5 (1987), the ALJ has a duty “to investigate the facts and develop the
11 arguments both for and against granting benefits” *Sims v. Apfel*, 530 U.S.
12 103, 110-11 (2000). This duty, known as the ALJ’s duty to develop the record,
13 requires ALJs to “scrupulously and conscientiously probe into, inquire of, and
14 explore for all the relevant facts.” *Higbee v. Sullivan*, 975 F.2d 558, 561 (9th Cir.
15 1992) (quotations omitted). “An ALJ’s duty to develop the record further is
16 triggered only when there is ambiguous evidence or when the record is inadequate
17 to allow for proper evaluation of the evidence.” *Mayes v. Massanari*, 276 F.3d
18 453, 459-60 (9th Cir. 2001).

19 “One of the means available to an ALJ to supplement an inadequate medical
20 record is to order a consultative examination, i.e., ‘a physical or mental

1 examination or test purchased for a claimant at the Social Security
2 Administration's request and expense.' " *Reed*, 270 F.3d at 841 (citing 20 C.F.R.
3 §§ 404.1519, 416.919) (brackets omitted). An ALJ possesses broad latitude in
4 determining whether to order a CE. *Id.* at 842. An ALJ may order an examination
5 "to try to resolve an inconsistency in the evidence, or when the evidence as a
6 whole is insufficient to allow him to make a determination or decision on [the]
7 claim." 20 C.F.R. §§ 404.1519a(b), 416.919a(b).

8 Here, the ALJ found "the record contains sufficient information regarding
9 [Plaintiff's] physical and mental health condition to make a decision without
10 ordering additional examinations" Tr. 12. Specifically, the ALJ noted that
11 the record contained mental health treatment notes from the Department of
12 Corrections and Central Washington Comprehensive Mental Health, a
13 psychological DSHS assessment, and primary care and emergency room records.
14 Tr. 12. "Moreover," the ALJ found "the record contains several inconsistencies
15 that undermine the claimant's credibility. Thus, input from him during additional
16 examinations would be questionable." Tr. 12.

17 Plaintiff challenges the ALJ's finding, contending the record was not fully
18 developed. ECF No. 15 at 16. Shortly before Plaintiff was released from prison,
19 Dr. Aoplanalp "HIGHLY RECOMMENDED" a "comprehensive instrument-
20 supported neurological and intellectual assessment." ECF No. 15 at 16 (citing Tr.

1 401) (emphasis in original). Citing *Tonapetyan v. Halter*, 242 F.3d 1144 (9th Cir.
2 2001), among others, Plaintiff contends Dr. Aoplanalp's recommendation
3 established the inadequacy of the record and triggered the ALJ's duty to further
4 develop the record. ECF No. 15 at 15-16.

5 In *Tonapetyan*, the medical expert found the claimant's medical record
6 confusing and recommended a more detailed report be obtained. 242 F.3d at 1150.
7 Because the ALJ relied on that expert's testimony, the Ninth Circuit held that the
8 ALJ "was not free to ignore [the medical expert's] equivocations and his concerns
9 over the lack of a complete record." *Id.*, at 1150-1151. As a result, the Court
10 concluded the ALJ's failure to obtain a more detailed report constituted reversible
11 error. *Id.*

12 Unlike *Tonapetyan*, the ALJ in the instant case did not rely on Dr.
13 Aoplanalp's opinion. To the contrary, the ALJ assigned "little weight" to the
14 opinion of Dr. Aoplanalp because his opinion is based on Plaintiff's discredited
15 symptom claims and is inconsistent with Plaintiff's longitudinal treatment history,
16 his performance on mental status examinations (MSEs), his daily activities, and
17 social functioning. Tr. 22-23. Plaintiff does not challenge this assessment. Thus,
18 unlike *Tonapetyan*, the ALJ was free to disregard Dr. Aoplanalp's
19 recommendation, which she did.

1 Plaintiff also suggests the ALJ should have further developed the record if
2 she questioned Dr. Crank's provisional assessment, limiting him to light work.
3 ECF No. 15 at 12, 15 (citing Tr. 558). In a check-box form, Dr. Crank indicated
4 Plaintiff ought to be limited to light work, but qualified his assessment as
5 preliminary until Plaintiff received an MRI of his lumbar spine and an evaluation
6 by a neurosurgeon. Tr. 558. The ALJ discounted Dr. Crank's opinion because it is
7 inconsistent with Plaintiff's "relatively benign physical treatment history, his
8 performance on physical examinations, and his independent daily functioning."
9 Tr. 22. But it is ambiguity – not inconsistency – that triggers the ALJ's duty to
10 further develop the record. *See Mayes*, 276 F.3d at 459-60. After discrediting Dr.
11 Crank's opinion, the ALJ was free to disregard Dr. Crank's recommendation as she
12 did Dr. Aoplanalp's.

13 Plaintiff has not shown an ambiguity or other impediment to proper
14 evaluation of the evidence that would require further development of the record.
15 *Mayes*, 276 F.3d at 459-60. The ALJ's findings are supported by a reasonable
16 interpretation of the evidence and must be upheld. *Batson v. Comm'r of Soc. Sec.*
17 *Admin.*, 359 F.3d 1190, 1193 (9th Cir. 2004); *Andrews v. Shalala*, 53 F.3d 1035,
18 1039-40 (9th Cir. 1995).

B. Medical Opinion Evidence

Plaintiff faults the ALJ for discrediting the medical opinions of Jeremiah Crank, M.D.; Norman Staley, M.D.; Bart Aoplanalp, Ph.D.; and Mark Duris, Ph.D. ECF No. 15 at 9-13.

There are three types of physicians: “(1) those who treat the claimant (treating physicians); (2) those who examine but do not treat the claimant (examining physicians); and (3) those who neither examine nor treat the claimant but who review the claimant’s file (nonexamining or reviewing physicians).” *Holohan v. Massanari*, 246 F.3d 1195, 1201-02 (9th Cir. 2001) (brackets omitted). “Generally, a treating physician’s opinion carries more weight than an examining physician’s, and an examining physician’s opinion carries more weight than a reviewing physician’s.” *Id.* at 1202. “In addition, the regulations give more weight to opinions that are explained than to those that are not, and to the opinions of specialists concerning matters relating to their specialty over that of nonspecialists.” *Id.* (citations omitted).

If a treating or examining physician’s opinion is uncontradicted, an ALJ may reject it only by offering “clear and convincing reasons that are supported by substantial evidence.” *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir. 2005). “However, the ALJ need not accept the opinion of any physician, including a treating physician, if that opinion is brief, conclusory and inadequately supported

1 by clinical findings.” *Bray v. Comm’r, of Soc. Sec. Admin.*, 554 F.3d 1219, 1228
2 (9th Cir. 2009) (internal quotation marks and brackets omitted). “If a treating or
3 examining doctor’s opinion is contradicted by another doctor’s opinion, an ALJ
4 may only reject it by providing specific and legitimate reasons that are supported
5 by substantial evidence.” *Bayliss*, 427 F.3d at 1216 (citing *Lester v. Chater*, 81
6 F.3d 821, 830-31 (9th Cir. 1995)).

7 Dr. Kester contradicted the opinions of Dr. Crank, Dr. Staley, Dr. Duris, and
8 portions of Dr. Aoplanalp’s opinions. The remaining portion of Dr. Aoplanalp’s
9 opinion, that Plaintiff is functionally illiterate, was contradicted by Ryan Donahue,
10 Ph.D. Accordingly, the ALJ was required to offer specific and legitimate reasons
11 supported by substantial evidence to discount these opinions.

12 *1. Dr. Staley and Dr. Crank*

13 Plaintiff contends the ALJ erred in rejecting the medical opinions of
14 reviewing physician Dr. Staley and of treating physician Dr. Crank. ECF No. 15 at
15 9-13.

16 In November 2012, Dr. Staley reviewed Plaintiff’s medical record, Tr. 83-
17 97, and opined that Plaintiff was functionally limited to lifting 20 pounds
18 occasionally and 10 pounds frequently, which Plaintiff notes is equivalent to light
19 work. Tr. 91; ECF No. 15 at 11-12.

1 On November 6, 2013, Dr. Crank checked a box on a medical questionnaire,
2 indicating Plaintiff could perform “light work.” Tr. 558. Dr. Crank qualified his
3 assessment as provisional until an MRI could be performed of Plaintiff’s lumbar
4 and a neurosurgeon could evaluate him. *Id.*

5 The ALJ discredited Dr. Staley and Dr. Crank’s opinions for the “same
6 reasons.” Tr. 22. “Based on the [Plaintiff’s] relatively benign physical treatment
7 history, his performance on physical examinations, and his independent daily
8 functioning,” the ALJ determined Plaintiff is capable of “medium exertional
9 tasks.” Tr. 22.

10 The ALJ found Plaintiff’s benign physical treatment history inconsistent
11 with Dr. Staley’s and Dr. Crank’s opinions. Tr. 22. While both physicians limited
12 Plaintiff to light work, Plaintiff’s records from the Department of Corrections show
13 Plaintiff never sought treatment for his back pain. *See generally*, Tr. 306-398.
14 While in prison, he was able to get up and down from his chair and ambulate
15 without difficulty. Tr. 324. Despite alleging an onset date of May 2007, as late as
16 May 2012, he reported “no physical complaints.” Tr. 352. In October 2012, after
17 Plaintiff was released from prison, he complained of some lumbar tenderness,
18 which he reported began 20 years ago. Tr. 438-439. In December 2012, he
19 exhibited no symptoms for bone or joint problems or muscle weakness. Tr. 497.
20 In 2013, a lumbar spine x-ray showed spondylosis with facet arthrosis, Tr. 507, but

1 later that year he reported no orthopedic problems other than some arthritis in his
2 fingers from prior fractures to his arms and fingers. Tr. 455. Plaintiff's
3 conservative treatment history is a specific and legitimate reason to reject Dr.
4 Staley and Dr. Crank's extreme limitations. *Johnson v. Shalala*, 60 F.3d 1428,
5 1434 (9th Cir. 1995).

6 The ALJ found Plaintiff's physical examinations inconsistent with Dr.
7 Staley and Dr. Crank's opinions. Tr. 22. While both physicians limited Plaintiff to
8 light work, physical examinations showed only mildly reduced range of motion in
9 October 2012. ECF No. 440. In December of 2012, his straight leg raise was
10 mildly positive in his left leg, but otherwise his range of motion was normal. Tr.
11 458. Doctors concluded his upper and lower extremities were normal and
12 neurologically intact. Tr. 458-459. In January 2013, an x-ray revealed spondylosis
13 and facet arthrosis in Plaintiff's back, Tr. 507, but he exhibited normal flexion,
14 extension, and rotation. Tr. 491. Additionally, tests of Plaintiff's ability to raise
15 his straightened leg when he was sitting and lying down were both negative. Tr.
16 491. Plaintiff's performance on these physical examinations are inconsistent with
17 Dr. Staley and Dr. Crank's opinions and constitute specific and legitimate reasons
18 for discounting those opinions. *Bray*, 554 F.3d at 1228 (An ALJ may reject a
19 physician's opinion not supported by clinical findings.).

1 Last, the ALJ found Plaintiff's daily activities inconsistent with the opinions
2 of Dr. Crank and Dr. Staley. Tr. 22. The ALJ noted that Plaintiff has no problem
3 taking care of his personal needs. Tr. 16. On a typical day, he made breakfast,
4 showered, watched television, and attended any appointments he had, such as
5 Alcoholics Anonymous meetings. Tr. 16 (citing Tr. 261-264). He was able to
6 wash dishes, do laundry, and clean his bedroom. Tr. 262. He attended church with
7 his girlfriend, reported going to the YMCA two or three times a week, and visiting
8 a friend in a hospital. Tr. 413-414, 534, 458. He reported socializing with friends
9 and family, volunteering at church, and visiting family in Boise and California. Tr.
10 508, 511, 513, 519, 529, 532. To get around, Plaintiff walked and took the bus,
11 including to return to Washington from Idaho. Tr. 263, 529. Plaintiff's daily
12 activities constitute a specific and legitimate reason for rejecting the opinions of
13 Dr. Crank and Dr. Staley. *See Morgan v. Comm'r of Soc. Sec. Admin.*, 169 F.3d
14 595, 600-02 (9th Cir. 1999) (considering an inconsistency between a treating
15 physician's opinion and a claimant's daily activities a specific and legitimate
16 reason to discount the treating physician's opinion).

17 Plaintiff contends the ALJ erred by rejecting their opinions when no
18 physician opined Plaintiff was capable of medium-level exertion. But, contrary to
19 Plaintiff's contention, Dr. Eugene Kester reviewed Plaintiff's medical record for
20

1 the Social Security Administration and opined that Plaintiff was capable of
2 medium work. Tr. 72.

3 Plaintiff disagrees with this reading of the record, contending Dr. Kester
4 only assessed Plaintiff's mental capacity. ECF No. 20 at 2-3 (citing Tr. 69-71).
5 While Dr. Kester signed the assessment of Plaintiff's mental capacity, Tr. 69-71,
6 he also signed the assessment of Plaintiff's vocational factors, indicating Plaintiff
7 could perform work at the medium-exertional level. Tr. 71-72. Thus, Dr. Kester
8 offered a contradictory opinion to the opinions of Drs. Staley and Crank.

9 Because Dr. Kester offered an opinion contradictory to Dr. Staley and Dr.
10 Crank, the ALJ could reject their opinions for specific and legitimate reasons.
11 *Bayliss*, 427 F.3d at 1216. Here, the ALJ considered Plaintiff's treatment history,
12 his performance on physical exams, and daily activities. Tr. 22. She found
13 Plaintiff's treatment history was relatively benign and his performance on physical
14 exams and daily activities consistent with medium-exertion work. Tr. 21-22.
15 Plaintiff does not challenge these reasons. ECF No. 15 at 9-12. Accordingly, the
16 ALJ offered specific and legitimate reasons for rejecting Dr. Crank and Dr.
17 Staley's opinions. *Johnson*, 60 F.3d at 1434 (a plaintiff's conservative treatment
18 history is a specific and legitimate reason to reject physician's opinion); *Bray*, 554
19 F.3d at 1228 (An ALJ may reject a physician's opinion not supported by clinical
20 findings.); *Morgan*, 169 F.3d at 600-02 (considering an inconsistency between a

1 treating physician's opinion and a claimant's daily activities a specific and
2 legitimate reason to discount the treating physician's opinion).

3 2. *Dr. Aoplanalp and Dr. Duris*

4 Plaintiff also assigns error to the ALJ's assessment of Dr. Aoplanalp and Dr.
5 Duris. ECF No. 15 at 12. Plaintiff contends the ALJ erred when she (1)
6 questioned whether he was functionally illiterate and (2) rejected the opinion that
7 he suffered from a "severe kind of psychotic or schizoid condition." ECF No. 15
8 at 12.

9 Dr. Aoplanalp diagnosed Plaintiff as functionally illiterate and opined that
10 his illiteracy and memory and concentration problems would interfere with his
11 ability to maintain employment. Tr. 399, 404. Dr. Duris noted that Plaintiff
12 reported to be functionally illiterate, Tr. 560, and diagnosed Plaintiff with
13 borderline intellectual functioning. Tr. 563. Additionally, based on Plaintiff's
14 history, Dr. Duris diagnosed Plaintiff with antisocial personality disorder. Tr. 563.
15 Dr. Duris believed Plaintiff would experience marked limitations in his ability to
16 understand, remember, and persist in tasks by following detailed instructions. Tr.
17 563.

18 The ALJ assigned Dr. Aoplanalp's and Dr. Duris' opinions little weight
19 because their opinions were inconsistent with Plaintiff's longitudinal treatment
20 history, his performance on MSEs, his independent daily activities and, instead,

1 were based on Plaintiff's subjective and discredited reports. Tr. 23. This
2 constitutes a clear and convincing reason for discrediting their opinions. *Thomas*
3 *v. Barnhart*, 278 F.3d 947, 957 (9th Cir. 2002) ("The ALJ need not accept the
4 opinion of any physician, including a treating physician, if that opinion is brief,
5 conclusory, and inadequately supported by clinical findings."); *see also, e.g.,*
6 *Bayliss*, 427 F.3d at 1216 (discrepancies between a doctor's own notes and
7 conclusions constitute a clear and convincing reasons to reject that doctor's
8 opinion).

9 Plaintiff assigns error to the ALJ's assessment, specifically contesting the
10 ALJ's rejection of Dr. Duris and Dr. Aoplanalp's opinion that he is functionally
11 illiterate. Dr. Duris did not opine that Plaintiff was functionally illiterate; he
12 merely noted that Plaintiff "reported history of learning difficulties . . . having
13 participated in special education," and that he "remains functionally illiterate." Tr.
14 560. Dr. Aoplanalp diagnosed Plaintiff as functionally illiterate. Tr. 399. But his
15 assessment appears entirely based on Plaintiff's reports. Tr. 402 (Plaintiff "stated
16 he could not read or write He remains largely illiterate ('I know the alphabet,
17 but can't read words or write them')").

18 The ALJ discredited these claims based on several inconsistencies. Tr. 21.
19 While Plaintiff alleges he is functionally illiterate, he signed the notice of hearing
20 acknowledgement with no indication he needed the forms read to him; he drives,

1 which requires that he read and write to get a license and the ability to read street
2 signs; and, perhaps most telling, Department of Corrections psychologist Ryan
3 Donahue, Ph.D., indicated Plaintiff “is able to write in English.” Tr. 21 (citing Tr.
4 185, 387). Because the ALJ properly discounted Plaintiff’s testimony – which
5 Plaintiff does not contest – the ALJ is permitted to discount the physicians’
6 opinions based on those discredited claims. *Tonapetyan*, 242 F.3d at 1149.

7 Plaintiff also contends the ALJ erred in rejecting their opinions that he
8 suffered from a severe kind of psychotic or schizoid condition which impacted his
9 ability to complete a normal workday without interruption. ECF No. 15 at 12.

10 Plaintiff makes no argument and cites no authority to challenge the ALJ’s
11 assessment. ECF No. 15 at 12. This Court reviews “only issues which are argued
12 specifically and distinctly in a party’s opening brief.” *Greenwood v. Fed. Aviation*
13 *Admin.*, 28 F.3d 971, 977 (9th Cir. 1994). Because Plaintiff fails to present
14 specific and cogent argument supported by citation to authority, the Court deems
15 his argument waived. *Id.*

16 **C. Medical Listing 12.03**

17 Plaintiff assigns error to the ALJ’s failure to consider whether he met or
18 equaled Medical Listing 12.03. ECF No. 15 at 12-13. Again, Plaintiff presents no
19 argument as to why the ALJ erred or how he met or equaled Listing 12.03, let
20 alone any authorities to support his claim. This Court will not consider arguments

1 not adequately briefed. *Greenwood*, 28 F.3d at 977. Because Plaintiff fails to
2 present specific and cogent argument supported by citation to authority, the Court
3 deems his argument waived. *Id.*

4 **D. Medical Vocational Guideline Rule 202.09**

5 Plaintiff contends the ALJ should have approved him for a period of
6 disability commencing when he turned 50 years old. Under Grid Rule 202.09, a
7 claimant is presumptively disabled if:

- 8 1. The claimant's physical RFC is limited to no greater than light;
- 9 2. The claimant is 50 years old or older;
- 10 3. The claimant is illiterate; and
- 11 4. The claimant's previous work experience is unskilled or none.

12 20 C.F.R. Part 404, Subpart P. App. 2, Rule 202.09. But Plaintiff does not meet
13 the requirements of Rule 202.09 because substantial evidence supports the ALJ's
14 findings that Plaintiff is not illiterate and can perform medium work. Accordingly,
15 the ALJ did not err.

16 **CONCLUSION**

17 The ALJ's decision is supported by substantial evidence and free of legal
18 error.

19 **IT IS ORDERED:**

- 20 1. Plaintiff's Motion for Summary Judgment (ECF No. 15) is **DENIED**.

1 2. Defendant's Motion for Summary Judgment (ECF No. 19) is
2 **GRANTED.**

3 The District Court Executive is directed to file this Order, enter
4 **JUDGMENT FOR THE DEFENDANT**, provide copies to counsel, and **CLOSE**
5 the file.

6 DATED this Wednesday, August 10, 2016.

7 s/ Mary K. Dimke
8 MARY K. DIMKE
9 UNITED STATES MAGISTRATE JUDGE
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